

## FROM THE DESK OF THE COMMISSIONER



As the year comes to a close for 2002, it appears the majority of our financial institutions in North Dakota will have very positive financial results. These results will be enjoyed despite the drought in the southwest, the flooding in the east, and as of this date, a lack of a substantial disaster program for the farm economy. You can hear more about the financial condition of North Dakota banks at the annual "Day with the Commissioner" for banks to be held on November

20, 2002. If you have not received a registration form, you can obtain one inside this issue or from our website at [DiscoverND.com/dfi](http://DiscoverND.com/dfi). We are very excited about this year's program as the FDIC will be in attendance and will talk about the new program "Process Redesign". Marilyn Foss, General Counsel for the North Dakota Bankers Association, will also be in attendance talking about privacy. Regulators from the Federal Reserve Bank and Office of the Comptroller of the Currency have also been invited. I look forward to seeing you in November.

## AMENDED RULES FOR CREDIT UNIONS AND BANKS

At the March 7, 2002, meeting the State Credit Union Board was asked to consider amending Sections 13-03-02-02 and 13-03-02-03 of the North Dakota Administrative Code relating to the real estate loan requirements and length of the terms. The Board instructed Department staff to work with Greg Tschider of the North Dakota Credit Union League to draft suggested language and proceed with publication and scheduling an administrative hearing on the matter. The proposed rule was published and an administrative hearing was held on July 12, 2002, at 10:00 am in the Office of the Department of Financial Institutions.

At the May 9, 2002, meeting the State Banking Board was asked to consider amending its administrative rule dealing with investment in Life Insurance or BOLI/COLI (bank owned life insurance/corporate owned life insurance) as they are more commonly

known. Representatives of Eide Bailly, LLP, and Clark/Bardes Consulting explained since the Department's administrative rules were adopted the federal regulators have issued two pronouncements which are now considered to be the industry guidance. As a result the administrative rules leave North Dakota state-chartered banks at a competitive disadvantage with their national counterparts as well as banks in neighboring states. Eide Bailly's representative also explained one of the primary uses of BOLI is to attract and retain key talent to small rural North Dakota banks and they have run into conflicts and difficulties between the North Dakota rule and the federal guidance. The Board instructed Department staff to work with Clark/Bardes to draft proposed amendments to the rules for their consideration. The Notice has been published and a hearing is scheduled for Nov. 14, 2002.

## RECORD AUTOMATION PROJECT

In June 2001 the staff of the Department of Financial Institutions began working with the state's Information Technology Department to develop a database for the records of the three separate bank, credit union, and consumer divisions within the Department. The goal is to automate as much of the paper information received from the respective regulated entities as possible. Included in the scope of the project was to make available on-line applications to the extent practical as part of the state's eGovernment initiative. Most of the benefit for the electronic applications fell into the realm of the consumer division; however, an on-going goal is to automate applications in all divisions as information technology continues to evolve.

The process involved identifying the system requirements for each of the divisions, development of the database, and testing of the database. The consumer division was chosen as the first area to be automated because of the extremely paper intensive process involved. If you have visited our website recently you will see the licensees for our consumer division are able to apply or renew their license online. We have completed the first two segments for the bank and credit union divisions and are in the process of testing the database now. Unfortunately, we have not automated as much of the application processes for these divisions since many of the applications require supplemental data (e.g. income projections, call report data) which is difficult to automate. We are hopeful as advances are made in the electronic signature area we will be able to automate more of the forms and applications for all regulated entities.

### ND RULES AND REGULATIONS...

... located on our web site



**DiscoverND.com/dfi**



**Rules and Regulations**

## MANAGEMENT

### COMPONENT RATINGS 1 VERSUS 2

Since the Department began disclosing the CAMELS component ratings a few years ago, the management component has probably been the area of greatest discussion for bankers and examiners during exit meetings. This discussion, while important, could direct management's attention away from the bigger picture. When you look at the definition as detailed in the Uniform Financial Institutions Rating, there isn't really much difference: a 1 indicates "strong" performance by management while a 2 indicates "satisfactory" performance. A 1 rating states "All significant risks are consistently and effectively identified, measured, monitored, and controlled. Management and the board have demonstrated the ability to promptly and successfully address existing and potential problems and risks." 2 rating states: "Minor weaknesses may exist, but are not material to the safety and soundness of the institution and are being addressed. In general, significant risks and problems are effectively identified, measured, monitored, and controlled." The management rating is indeed the most difficult rating to assign because there is a great deal of subjectivity involved. Regulators agonize over this particular component. There are many things that go into the examiner's consideration of the rating but the key is whether "ALL risks are ... consistently...identified, measured, monitored, and controlled" or are there minor weaknesses that exist? Our intent is not to discourage open and frank discussion, but to have the industry consider that a satisfactory or 2 rating is not that much different from a strong 1 rating.

Please keep in mind that the management rating as well as all other component ratings assigned at the conclusion of the on site examination are tentative recommendations by the examiner in charge. All ratings are further reviewed by the staff of the Department prior to finalization. If you have strong disagreement with any component or composite rating you are encouraged to contact the Department prior to the finalization of the report.



# WILL THIS CHECK CLEAR?

## PRIVACY CONCERNS

One of the many situations facing financial institutions today concerning privacy is when the financial institution receives a telephone call inquiring whether a check will clear on a customer's account. The financial institution is now faced with violating the customer's right to privacy and performing a service to the customer. We have been advised that some financial institutions will not disclose whether the check will clear unless the customer authorizes the release of the information or that some financial institutions are not disclosing the information at all.

A 1985 Attorney General's Opinion addresses this matter for financial institutions. One of the two questions posed in Opinion No. 85-38, which is reprinted in this Newsletter, was "whether a financial institution's disclosure to a business of the sufficiency of a customer's account to cover a check issued by the customer to the business falls within the exception of N.D.C.C. 6-08.1-02(6)." The exception in the statute states, "The exchange in the regular course of business of customer credit information between a financial institution and other financial institutions or commercial entities, directly, or through a customer reporting agency." The Attorney General's opinion is that a financial institution's response would fall within the exception: HOWEVER, the disclosure is discretionary and not mandatory (emphasis supplied). If your financial institution is concerned about violating a customer's privacy this opinion should give you some comfort and help you decide how to handle these calls in today's privacy environment.

Office of the Attorney General  
State of North Dakota  
Opinion No. 85-38  
Date Issued: October 11, 1985

Senator John M. Olson

### -- QUESTIONS PRESENTED --

I Whether a financial institution's disclosure to a realtor or closing agent of a customer's outstanding indebtedness on specific real property in relation to the sale or transfer of the property falls within the exception of NDCC 6-08.1-02(6).

II Whether financial institution's disclosure to a business of the sufficiency of a customer's account to cover a check issued by the customer to the business falls within the exception of N.D.C.C. 6-08.1-02(6).

### -- ATTORNEY GENERAL'S OPINION--

I It is my opinion that a financial institution's disclosure to a realtor or closing agent of a customer's outstanding indebtedness on specific real property in relation to the sale or transfer of the property falls within the exception of N.D.C.C. 6-08.1-02(6).

II It is my further opinion that a financial institution's disclosure to a business of the sufficiency of a customer's account to cover a check issued by the customer to the business falls within the exception of N.D.C.C. 6-08.1-02(6).

### -- ANALYSES --

I N.D.C.C. Chapter 6-08.1 was enacted by the Legislative Assembly with the purpose of establishing specific statutory guidelines for financial institutions in responding to requests for disclosure of customer information. Generally, N.D.C.C. Chapter 6-08.1 prohibits disclosure of customer financial information in the absence of express customer consent or valid legal process. However, the requirements of N.D.C.C. Chapter 6-08.1 do not apply to:

The exchange in the regular course of business of customer credit information between a financial institution and other financial institutions or commercial entities, directly, or through a customer reporting agency.

N.D.C.C. 6-08.1-02(6) the absence of a statutory definition of 'commercial entity' necessitates a determination of its ordinary meaning. N.D.C.C. 1-02-02. Although the legislature has not defined 'commercial entity,' it has articulated a definition of 'business entity' in N.D.C.C. Chapter 51-22. Inasmuch as 'commerce' is generally considered to be synonymous with 'business,' Webster's New World Dictionary, 258 (2d Ed. 1982), the legislature's definition of "business entity" is persuasive in determining the ordinary meaning of "commercial entity."



N.D.C.C. 51-22-01(1) DEFINITIONS. As used in this chapter: 'Business entity' means a sole proprietorship, partnership, corporation, association, or other group, however organized and whether or not organized to operate at a profit, doing business in this state.

Apart from N.D.C.C. 51-22-01(1), the ordinary meanings of 'commercial' and 'entity' yield an equally broad definition of 'commercial entity.' The word commercial may be defined as 'of, or connected with commerce or trade.' Webster's New World Dictionary, 285 (2d Ed. 1982). Entity has been defined as 'a thing that has definite, individual existence. . . .' Id. at 467.

The ordinary meaning of 'commercial entity,' thus, contemplates virtually any organization doing business. As such, the plain meaning of 'commercial entity' would include realtors and closing agents transacting business in this state.

A further requirement of N.D.C.C. 6-08.1-02(6) is that the exchange of credit information be made in the 'regular course of business.' 'Regular course of business' has been interpreted as meaning 'in the inherent nature of the business in question, and in the method systematically employed for the conduct of the business as a business.' Missouri Valley Walnut Co, v. Snider, 569 S.W.2d 324, 328 (Mo. Ct. App. 1978). Hence, whether the exchange of credit information is in the 'regular course of business' necessarily depends on the factual circumstance of each particular case. However, it is my opinion that disclosure of a customer's outstanding principal and interest balances to a realtor or closing agent participating in the sale or transfer of the customer's mortgage property would fall within the scope of 'regular course of business.'

It is my opinion that a financial institution's disclosure to a realtor or closing agent of a customer's outstanding indebtedness of specific real property in relation to the sale or transfer of the property falls within the exception of N.D.C.C. 6-08.1-02(6). Although a financial institution is excepted from the general requirements of N.D.C.C. chapter 6-08.1 in such a situation, N.D.C.C. 6-08.1-02(6) does not mandate that the financial institution comply with the disclosure request. Rather, disclosure pursuant to N.D.C.C. 6-08.1-02(6) is strictly a discretionary matter for each individual financial institution.

II The above interpretative analysis of 'commercial entity' and 'regular course of business' would

also apply in determining whether the exception of N.D.C.C. 6-08.1-02(6) encompasses a financial institution's disclosure to a business regarding the sufficiency of a customer's account to cover a check issued by the customer to the business. The broad interpretation of 'commercial entity' would undoubtedly comprehend the typical business. Furthermore, it is my opinion that a business' request for the adequacy of a customer's account balance, and the financial institution's response thereto, would fall within the scope of 'regular course of business.'

Therefore, it is my opinion that a financial institution's disclosure to a business of the sufficiency of a customer's account to cover a check issued by the customer to the business falls within the exception of N.D.C.C. 6-08.1-02(6). As mentioned above, disclosure pursuant to N.D.C.C. 6-08.1-02(6) is discretionary and not mandated by law.

#### -- EFFECT --

This opinion is issued pursuant to N.D.C.C. 54-12-01. It governs the action of public officials until such time as the question presented is decided by the courts.

Nicholas J Spaeth, Attorney General  
Assisted by: Steve E Noack, Assistant Attorney General

## NEW EMPLOYEES

The Department of Financial Institutions has two new employees. Jeff Jungman has been named our Chief Examiner – Banks. Jungman comes to us from Estes Park, CO, where he worked at Weststar Bank as Regional President. Prior to Weststar Bank, Jungman was the Assistant to the Superintendent at the Iowa Division of Banking. He is a graduate of Iowa State University Ames, Iowa. Jeff and his wife Carol have two sons. Joan Becker, our new Business Manager, is not new to State Government. Becker started with the State of North Dakota Tax Department 23 years ago as a Sales Tax Field Auditor. While at the Tax Department she also worked as an Accounting Budget Specialist. The past 6 years Becker was employed at the North Dakota State Treasurer's Office as the Financial Manager. Joan and her husband Ken have one son.

The Department of Financial Institutions welcomes our new employees and is excited to have them as part of our team.



# **Day with the COMMISSIONER**

**for Banks — Wednesday, November 20, 2002**

Speakers from FDIC

Also invited Federal Reserve and OCC

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Topics will include Privacy,  
Examination Results, and Banking Trends

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**Ramkota Best Western  
Bismarck, ND**

Formally known as the Radisson Inn

9:00 am - 3:00 pm

Registration Fee: \$25

Registration Deadline November 15, 2002

# DAY WITH THE COMMISSIONER BANKS

## REGISTRATION FORM

Wednesday November 20, 2002

Number of people attending \_\_\_\_\_

From \_\_\_\_\_  
(Name of Bank)

@ \$25.00 per person = \$ \_\_\_\_\_ enclosed

Please print the names of those attending.  
We will have name tags available at the time of registration

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Please return to:  
Department of Financial Institutions  
2000 Schafer Street, Suite G  
Bismarck, ND 58501-1204

## PLEDGING

Over the last few months we have seen a modest increase in the area of noncompliance in pledging requirements for public funds. Two of the last six state examinations have revealed that there are some questions relating to North Dakota Century Code Section 21-04-09.

When a financial institution accepts deposits from a public corporation, the financial institution shall pledge to the public body securities in an amount of "\$110 for every \$100 of public deposits". Securities that are eligible for pledging are bills, notes, or bonds issued by the United States government, its agencies or instrumentalities, all bonds and notes guaranteed by the United States government, irrevocable standby letters of credit issued by federal home loan banks of a rating of AA or better by Moody's Investors Service, Inc. or Standard & Poor's Corporation, federal land bank bonds, bonds, notes, warrants, certificates of indebtedness, insured certificates of deposit, shares of investment companies registered under the Investment Companies Act of 1940, letters of credit issued by the Bank of North Dakota, and all other forms of securities issued by the State of North Dakota, its boards, agencies, or instrumentalities, or by any county, city, township, school district, park district, or other political subdivision of the state of North Dakota, whether payable from special revenues or supported by the full faith and credit of the issuing body, and bonds issued by any other state of the United States or such other securities approved by the State Banking Board.

On March 13, 2001, the Department sent out a Memorandum detailing those other securities approved by the State Banking Board. Enclosed is a copy of that Memorandum. Also, the North Dakota Century Code allows a financial institution to fulfill the pledge of securities requirements of 21-04-09 by maintaining a securities pledge schedule that establishes the following:

1. The names of all public bodies maintaining deposits with the financial institution.
2. The amount of each deposit maintained by each public body.
3. The amount of federal deposit insurance corporation insurance applied to each account.
4. The net deposits exceeding federal deposit insurance corporation coverage for each account.
5. The amount of net deposit exceeding federal deposit insurance corporation deposit insurance multiplied by one hundred ten percent for each account.

6. The amount of securities needed to be pledged to fulfill the requirements of this section.

7. The total number of qualified securities pledged by the financial institution under the requirements of this section.

Securities pledged may be substituted by the financial institution without the consent of the public body; however, securities substituted must at the time of substitution have a market value at least equal to the market value of the securities released. The financial institution must on the same day of substitution deliver by registered mail to the public body a receipt specifically describing both the security substituted and the security released.

A financial institution does not have to pledge securities for any funds to the extent that the deposits of the public body are insured by the FDIC or NCUA.

Compliance with this Section of the North Dakota Century Code will require the financial institution to maintain meticulous records and these records will be reviewed by representatives of this Department during each examination. If you have questions regarding pledging of public funds, please do not hesitate to contact this Department.

## MEMORANDUM

TO: Chief Executive Officer of the Financial Institutions  
Addressed

FROM: Robert J. Entringer, Chief Examiner – Banks

RE: Securities Eligible for Pledge to Municipalities

DATE: March 13, 2001

As you are aware, § 21-04-09, North Dakota Century Code, specifies the types of securities that are eligible for pledge to the deposits of a public corporation. Section 21-04--09, NDCC, also gives the State Banking Board authority to approve other securities which shall be eligible for pledge as security for the repayment of deposits of a public corporation. The following is a list of those securities approved by the State Banking Board for pledge to the deposits of public corporations:

<u>Type of Security</u>	<u>Approval Date</u>
General Obligations of out-of-state political subdivisions rated "A" or better by a nationally recognized rating service	May 18, 1988
Agency CMO securities	May 1, 1993
Federal agency preferred stock	July 11, 1996
Bank of North Dakota certificates of deposit	March 8, 2001

If you have any questions regarding this Memorandum, please feel free to contact me at 701-328-9936.

## DEPARTMENT OF FINANCIAL INSTITUTIONS STAFF

Timothy J. Karsky .....	Commissioner .....	328-9935
Robert J. Entringer .....	Assistant Commissioner .....	328-9936
Jeff Jungman .....	Chief Examiner - Banks .....	328-9938
James M. Laidlaw .....	Chief Examiner - Credit Unions .....	328-9937
Joan Becker .....	Director of Administration .....	328-9958
Greg Meidinger .....	Consumer Licensing Investigator/Examiner .....	328-9940
Wayne Hatzenbuehler .....	Credit Union Examiner .....	328-9943
Suzette Richardson .....	Administrative Assistant (Bank/Credit Union) .....	328-9933
Lisa Fischer .....	Administrative Assistant (Licensing/Consumer) .....	328-9934
Scott Miller .....	Assistant Attorney General .....	328-2100

### Bismarck Examination Crew

Doug Grenz, Supervising Examiner  
 Monte Wolf, FI Examiner II  
 Dawn Ystaas, FI Examiner I  
 Mitzi Bjorland, FI Examiner I

### Minot Examination Crew

Doug Grenz, Supervising Examiner  
 Vacant, FI Examiner III  
 Troy Potter, FI Examiner I  
 Mike Martin, FI Examiner I

### Fargo Examination Crew

Dave Lessard, Supervising Examiner  
 Joe Banister, FI Examiner III  
 Mike Aschauer, FI Examiner I  
 Angie Mills, FI Examiner

### Grand Forks Examination Crew

Doug Hoselton, Supervising Examiner  
 Chad Faul, FI Examiner I  
 Tom Metelmann, FI Examiner I

## STATE BANKING BOARD

Ronald Braseth .....	The Goose River Bank .....	Mayville .....	786-3110
Bill Daniel .....	Public Member .....	Bismarck .....	223-8488
Launa Moldenhauer .....	Kirkwood Bank & Trust Co. ....	Bismarck .....	258-6550
Roger Monson .....	The Citizens State Bank of Finley .....	Finley .....	524-1921
Gary Petersen .....	Lakeside State Bank .....	New Town .....	627-4717
Terry Zeltinger .....	United Community Bank of ND .....	Minot .....	839-3500

## STATE CREDIT UNION BOARD

Charles Gates .....	Director - Area Community CU .....	Grand Forks .....	772-5029
Judy Millar .....	Public Member .....	West Fargo .....	282-4692
Ervin Mund .....	St. Alexius Medical Center CU .....	Bismarck .....	530-7189
Steven Tonneson .....	Prairie Federal CU .....	Minot .....	837-5353

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